

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000249-MR

KEVIN LAMONT SIMMS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 08-CR-002038

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CAPERTON, LAMBERT, AND MOORE, JUDGES.

MOORE, JUDGE: The Appellant, Kevin Lamont Simms, was convicted of trafficking in marijuana over five pounds and of being a convicted felon in possession of a handgun. Simms was sentenced to five years on each count, ordered to run consecutively for a total of ten years. Simms now appeals, arguing that his convictions should be reversed because of problems with the chain of

custody and an illegal “knock and talk.” Following a review of the record, the arguments of the parties, and the applicable law, we affirm.

On March 11, 2008, close to midnight, Simms was traveling eastbound toward the home of his girlfriend, Courtney Ruff, and was driving on St. Andrews Church Road. Officer Sean Szpila, who was traveling westbound, saw Simms’s headlights approaching. According to Officer Szpila, Simms’s vehicle traveled slightly over the yellow line. Officer Szpila testified that as Simms passed him, he noticed sparks coming from beneath Simms’s vehicle. Officer Szpila also stated that debris from Simms’s vehicle hit his cruiser. Accordingly, Officer Szpila turned his cruiser around and activated his emergency lights. Simms pulled over. As Officer Szpila approached the vehicle, he smelled burned rubber. Officer Szpila noted that the passenger side of Simms’s Ford Explorer was damaged, and the two tires on the passenger side were flat, one being flattened down to the rim.

Officer Szpila asked for Simms’s driver’s license, proof of insurance, and registration, which Simms provided. The registration papers indicated that the vehicle belonged to Ruff. Officer Szpila testified that while standing next to the vehicle, he observed open containers of alcohol in the center console and could smell fresh, unburned marijuana. Officer Szpila asked Simms to exit the vehicle, and testified that he suspected Simms might have been under the influence of something. Officer Szpila did not administer any sobriety tests at that time.

Simms was taken to the rear of his car and in front of the police cruiser. Lt. Mark Fox arrived on the scene and watched Simms while Officer

Szpila searched the car that Simms had been driving. While doing so, Officer Szpila discovered a gallon-sized baggie of less than a pound of what he believed to be marijuana and another smaller bag underneath, with approximately ¼ ounce of marijuana. Upon discovering the marijuana, Officer Szpila, who had only been working as an officer for about two years, called his supervisor, Sgt. Mike Minniear. Officer Szpila also seized these items and placed Simms under arrest. Simms was then handcuffed and placed in the back of Officer Maurice Rocky's cruiser.

Officer Szpila and Sgt. Minniear agreed to meet at Ruff's home to instigate a narcotics investigation. Rather than being taken directly to jail, Simms was transported to Gaymont Drive, where Ruff lived. Officer Rocky parked a couple of houses away from Ruff's home and waited with Officer Szpila for Sgt. Minniear to arrive. Once Sgt. Minniear arrived, he and Officer Szpila approached the residence. They went to the front door and rang the doorbell. When Ruff answered, the officers introduced themselves and asked to come inside, stating that it was cold outside. Ruff permitted the officers to enter the home and stated that at no time was she threatened or forced to allow the police to come inside or search.

Officer Szpila and Sgt. Minniear both testified that upon entering the home they could smell burned marijuana. They also encountered an individual by the name of Robert Murphy, also known as Marcus Neal. Once in the kitchen, they sat at the kitchen table, where an ashtray containing marijuana roaches was located. At around that time, Ruff inquired as to why the officers were there. Sgt.

Minniear told her that her car had been pulled over and a large bag of marijuana had been found inside. He then asked for consent to search the home, telling Ruff that she could consent or they would get a warrant. She consented and signed a “Miranda Waiver of Rights” form, as well as a “Consent to Search” form. The officers then proceeded to search the home.

Sgt. Minniear asked Ruff if there was any other marijuana in the house and, in response, she led them to the bedroom where they discovered two tubs full of loose marijuana weighing close to 50 pounds, a bag with six packaged gallon-size bags of marijuana, and a small amount of cocaine. A digital scale and a handgun were also located in Ruff’s bedroom. Ruff stated that Simms had access to her bedroom and that he slept there. Ruff insisted that the marijuana was not hers, and explained that she and Simms and Murphy had travelled to Florence, Kentucky, earlier that day. Ruff said that the marijuana was not there before they left and that after they returned Simms left in her car and she discovered the marijuana thereafter. During the course of her testimony below, Ruff testified that while in Florence, Simms and Murphy left her swimming at a hotel while they went out for several hours. Ruff stated that when they returned, they were ready to leave and she drove them back to her residence in Louisville. She testified that there was a large black garbage bag in the back of her vehicle when she left Florence that had not been there before, but she did not know what was in it. Ruff subsequently discovered the aforementioned marijuana in her bedroom.

Both Ruff and Murphy were arrested along with Simms on multiple charges, which included complicity to traffic in marijuana over five pounds while in possession of a firearm, possession of drug paraphernalia, possession of cocaine while in possession of a firearm, and possession of a handgun by a convicted felon. Both Ruff and Simms were also indicted for being persistent felony offenders in the second degree. Simms was also charged with reckless driving and possession of an alcoholic beverage container in a motor vehicle.¹

Ruff ultimately pled guilty to reduced charges as offered by the Commonwealth. In exchange for her testimony, she pled to facilitation to trafficking in marijuana over five pounds and possession of cocaine. All other charges, including the PFO, were dismissed and the recommended sentence was two years probated for five years. On the day of trial, the Commonwealth dismissed all charges against Murphy in exchange for his testimony that the marijuana did not belong to him.

Prior to trial, Simms's counsel filed motions asserting that the Commonwealth had to establish a chain of custody before admitting evidence of the marijuana. In addition, counsel argued that the marijuana seized from the car must be kept separate from the marijuana seized from the home, arguing that while Simms might take responsibility for the marijuana in the vehicle, that did not mean he accepted responsibility for the marijuana in the home. Those motions were denied by the trial court. Prior to trial, counsel also filed several motions seeking

¹ These latter two charges were dismissed prior to trial.

suppression of what Simms asserted were the fruits of an illegal search due to Officer Spzila and Sgt. Minniear gaining entry into Ruff's home through the ruse that it was cold outside, arguing that it was an illegal "knock and talk."

Following a jury trial which was conducted on September 21, 2010, Simms was acquitted of all charges except for trafficking in marijuana over five pounds. The trial was trifurcated, and the second phase involved the charge of possession of a handgun by a convicted felon. The Commonwealth put on proof that at the time Simms possessed the handgun, he had a conviction for promoting contraband. The jury returned a guilty verdict on that charge.

Following submission of proof during the penalty phase, the jury returned with a sentence of five years on the trafficking in marijuana over five pounds and five years on the possession of a handgun by a convicted felon. It was recommended that the sentences run consecutively. The court imposed this sentence as recommended by the jury, and this appeal followed.

As his first basis for appeal, Simms argues that the trial court erred to his substantial prejudice and denied him due process of law when it refused to suppress the marijuana found in the vehicle and the home after the Commonwealth failed to prove the chain of custody beyond a reasonable doubt. In his motion before the court below, Simms argued that there was a discrepancy in weights between what the police department recorded and the report generated by the lab, noting that the weight recorded by the police department was substantially higher.²

² There were two boxes of marijuana submitted into evidence below, marked as Commonwealth Exhibits 1 and 2. According to Sgt. Yevitz, Commonwealth Exhibit #1 weighed 26.94 pounds,

The trial court denied that motion, as well as the motion made by Simms requesting an order that the marijuana seized from the vehicle be treated separately from that seized at Ruff's residence.

Concerning the chain of custody issue below, Sgt. Yevitz testified that he was in charge of the drug vault at the police station where evidence is kept pending laboratory testing and trial. Simms made issue of the discrepancy between the weights measured by the police department and those made by Amelia Gordon, the forensic scientist at the laboratory. Simms asserted that the distinct differences in weight went to the integrity of the case; that there is a question as to whether the marijuana tested by the regional lab was the same unaltered evidence originating with Simms; and whether it remained materially unchanged from the time of its collection to the time it was sent to the laboratory.

Additionally, Simms argues that the marijuana found in the vehicle should have been a separate and distinct charge from that seized in the home. Simms argues that by co-mingling the marijuana, his right to a fair trial under the Fourth and Sixth Amendments of the United States Constitution was violated because the jury could have found that the marijuana in the car was his, while the marijuana in the home was not.

and Commonwealth Exhibit 2 weighed 19.66 pounds. According to Ameila Gordon, the forensic scientist who weighed and tested the exhibits, Exhibit 1 weighed 23.1 pounds, and Exhibit 2 weighed 15.7 pounds. Simms also noted that Officer Szpila testified that a box containing 6 bags of pre-packaged marijuana in gallon-sized baggies was found at the home of Ruff, and weighed 7.56 pounds. By contrast, Gordon testified that the total weight of the bags was 6 pounds.

The Commonwealth argues that the evidence against Simms was properly admitted and that any weight discrepancies should go to the credibility of the evidence and not to its admissibility. Concerning Simms's argument that the marijuana seized in his vehicle and the marijuana seized in Ruff's residence were improperly combined, the Commonwealth argues that the marijuana obtained in Ruff's home was simply part of the continuing course of conduct of trafficking, included in the possession and trafficking of the marijuana discovered in Simms's vehicle. The Commonwealth asserts that Simms's arrest was not a sufficient legal process to interrupt the continuing course of his trafficking in marijuana.

In addressing the arguments of the parties on these issues, we note that:

An appellate court's standard of review of the trial court's decision on a motion to suppress requires that we first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive. Based on those findings of fact, we must then conduct a de novo review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law.

Commonwealth v. Neal, 84 S.W.3d 920, 923 (Ky.App. 2002). Further, we review the facts only for clear error, and give due weight to inferences drawn from those facts by the trial judge. *Stewart v. Commonwealth*, 44 S.W.3d 376, 380 (Ky.App. 2000). At a suppression hearing, the trial judge is the sole trier of fact and the sole judge of the credibility of the witnesses. *Henson v. Commonwealth*, 20 S.W.3d 466, 469 (Ky. 1999). The burden is on the appellant to demonstrate that the ruling

of the trial court was clearly erroneous. *Hughes v. Commonwealth*, 87 S.W.3d 850 (Ky. 2002). In the absence of any showing to the contrary, the reviewing court must assume that the trial court ruled correctly. *Harper v. Commonwealth*, 694 S.W.2d 665, 668 (Ky. 1985) (*overruled on other grounds by Barnett v. Commonwealth*, 317 S.W.3d 49 (Ky. 2010)).

The Commonwealth has argued, and we agree, that the holding in *Penman v. Commonwealth*, 194 S.W.3d 237 (Ky. 2006) (*overruled on other grounds by Rose v. Commonwealth*, 322 S.W.3d 76 (Ky. 2011)), is on point. In *Penman*, the court held that a discrepancy in the weight of cocaine as measured by the laboratory and by the police department went to the credibility of the evidence and not to its admissibility, given that the state's evidence established to reasonable probability that the cocaine introduced at trial was the same substance involved in the incidents in question.

In this matter, as in *Penman*, the Commonwealth did in fact establish to a reasonable probability that the marijuana introduced at trial was the same as that which was seized. Furthermore, the Commonwealth introduced testimony from Kentucky State Police Laboratory chemist Amelia Gordon to the fact that she had seen discrepancies occur in the weight of marijuana before and that it was often attributable to the marijuana losing water weight as it dried with the passage of time.

Having so found, we turn to the issues of whether the marijuana seized in the vehicle and the marijuana seized at Ruff's residence were improperly combined.

In his argument, Simms cites to several cases interpreting Kentucky Revised Statutes (KRS) 505.020(1)(c) on whether separate convictions may arise when the events supporting the convictions have been interrupted by the "legal process." However, each case cited reviews the issue of an intervening "legal process" under a double jeopardy analysis. The issue of double jeopardy is not before this Court. Nonetheless, we do not discount that KRS 505.020(1)(c) may apply outside the realm of a double jeopardy argument. However, KRS 505.020(1)(c) does not provide an avenue of relief for Simms, as explained *infra*.

Pursuant to KRS 218A.1421(5), "(t)he unlawful possession by any person of eight (8) or more ounces of marijuana shall be prima facie evidence that the person possessed the marijuana with the intent to sell or transfer it." Thus, the trafficking conviction stemmed from a charge of possession of a quantity of marijuana large enough that trafficking was presumed. *See Hatcher v. Commonwealth*, 310 S.W.3d 691, 697 (Ky.App. 2010).

The marijuana found in the vehicle driven by Simms was approximately one pound, and the marijuana found at Ruff's residence was well over five pounds. The jury was presented with evidence that Simms lived with Ruff in her home; the marijuana was found in their joint bedroom after Ruff went in there to retrieve her cellular telephone while Simms was gone; Ruff testified that

the marijuana had not been there previously; Ruff testified the marijuana was not hers; and Murphy testified he had no knowledge of the marijuana.

It was the province of the jury to believe or disbelieve the testimony of Ruff and Murphy that the marijuana was not theirs, leaving it to be owned by Simms. We cannot say the jury did not make proper credibility findings and did not properly weigh the evidence in the case.

Even assuming *arguendo* it was error not to instruct the jury separately on the two different quantities of marijuana, this was at best harmless error. The marijuana found in the vehicle driven by Simms was not necessary for the verdict returned by the jury, which found him guilty of “Trafficking in Marijuana over 5 Lbs.” Therefore, the combination of the marijuana was at best harmless error.

Having so found, we now turn to the final issue raised by Simms on appeal, namely, his assertion that the use of the “knock and talk” procedure by the police was unduly coercive and that as a result, the fruits of the search of Ruff’s home should be suppressed. Simms asserts that the officers did not inform Ruff they were conducting a narcotics investigation, and instead asserts that they used the ruse of claiming to be cold to gain entry into the home. He argues that Ruff’s consent was obtained through subtle coercion and that the evidence discovered was from an impermissible search disguised as a “knock and talk.” Thus, Simms argues that the evidence obtained was the “fruit of the poisonous tree” and must be excluded.

In response, the Commonwealth argues that Ruff gave voluntary and knowing consent to search her home and that Simms cannot now claim that it was coerced. Having reviewed the record and applicable law, we agree with the Commonwealth that Ruff's consent was knowing and voluntary, and disagree with Simms's assertion that the "knock and talk" conducted by the police was unduly coercive.

In addressing this issue, we note that our United States Supreme Court has long held that all searches without a warrant are unreasonable unless the search falls within one of the exceptions to the warrant requirement. *See Farmer v. Commonwealth*, 6 S.W.3d 144, 146 (Ky.App. 1999) (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022 (1971)). One such exception to that requirement is consent. *Id.* The question of the voluntariness of consent to search is to be determined by an objective evaluation of police conduct, and not by the defendant's subjective perception of reality. *Cook v. Commonwealth*, 826 S.W.2d 329, 331 (Ky. 1992). Factors to be considered in assessing the voluntariness of consent include the following: (1) The voluntariness of the defendant's custodial status; (2) The presence of coercive police procedures; (3) The extent and level of the defendant's cooperation; (4) The defendant's awareness of his right to refuse consent; (5) The defendant's education and intelligence; and (6) The defendant's belief that no incriminating evidence will be found. *Baltimore v. Commonwealth*, 119 S.W.3d 532, 540 n. 34 (Ky.App. 2003). Whether consent to search was voluntarily given is a question of fact to be determined by the preponderance of the

evidence, and the burden of proof is with the Commonwealth. *Talbott v.*

Commonwealth, 968 S.W.2d 76, 82 (Ky. 1998).

Below, Officer Spzila, Sergeant Minniear, and Ruff all testified that Ruff's consent to search the home was knowingly, voluntarily, and intelligently given. Ruff signed a "Consent to Search" form and a "Waiver of rights" form and also testified at trial that she was neither threatened nor coerced into providing consent. Because Ruff's consent was knowing, voluntary, and uncoerced, the search conducted was proper. *Gallman v. Commonwealth*, 578 S.W.2d 47, 48 (Ky. 1979).

For the foregoing reasons, we affirm the January 7, 2011 judgment of conviction and sentence after jury trial of the Jefferson Circuit Court.

LAMBERT, JUDGE, CONCURS

CAPERTON, JUDGE, CONCURS IN PART, DISSENTS IN PART,
AND FILES SEPARATE OPINION.

CAPERTON, JUDGE, CONCURRING IN PART AND
DISSENTING IN PART: I concur with the well-reasoned and written opinion of the majority on all issues but whether the two distinct amounts of marijuana were properly charged as one count of possession. I have reviewed the record and applicable law, and agree with Simms.

I find the recent Kentucky Supreme Court decision in *Williams v. Commonwealth*, 336 S.W.3d 42 (Ky. 2011) to be persuasive on this issue. Therein, two quantities of cocaine were at issue: the first quantity found in the car and the

second quantity being that which Williams tried to swallow while in the back of the police cruiser. The Court held that Williams:

[P]ossessed two discrete quantities of cocaine – the quantity found in the car and the quantity that he tried to swallow while in the back of the cruiser. And precedent requires that the same contraband must be continually possessed – without an interruption in the form of legal process – in order for only one offense to have occurred.

Williams, 336 S.W.3d at 45.

Sub judice, the first portion of marijuana was discovered in the vehicle that Simms was driving. He was arrested for that quantity of marijuana and driven to Ruff's residence, where the police discovered an additional quantity of marijuana in Ruff's bedroom for which Simms, Ruff, and Murphy all denied responsibility. I believe these to be two distinct and separate quantities of marijuana, and do not find the Commonwealth's argument of a single course of intent and distribution to be persuasive based on the record below.

As our Supreme Court held in *Stewart v. Commonwealth*, 306 S.W.3d 502, 506 (Ky. 2010), KRS 505.020(1)(c) provides that separate convictions for possession may arise when the continued possession has been interrupted by the legal process. The Court went on to explain that "legal process" includes an arrest warrant, an indictment, or an arraignment. *Id.* Such was the case in the matter *sub judice*. I would find that the marijuana in the car and the marijuana in the home were two separate and distinct quantities of marijuana, the discovery of which was clearly interrupted by an intervening legal process in the form of Simms's arrest.

In so finding, I briefly note my disagreement with the Commonwealth's assertion that the failure to charge Simms with two separate offenses was harmless error. Certainly, had there been two separate charges, the jury could have found Simms guilty of possessing the marijuana in the car while determining that it was not he, but someone else, who possessed the marijuana in the home. The combined instruction could clearly coerce the jury to find Simms guilty of the possession of all of the marijuana when they may truly have believed that he was only guilty of possession of the one cache because, whether it be that found in the house or the vehicle, the jury necessarily had to convict Simms on both to convict on either.

Accordingly, I agree with Simms's assertion that there should have been two separate counts charging the two distinct caches of marijuana. I would reverse and remand for a new trial.

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